1749

SUPREME COURT OF THE UNITED STATES.

No. ~~250.~~ 118.

JOHN B. MURRAY AND JOHN W. BROWN, PLAINTIFFS IN ERROR,

vs.

RICHARD P. LARDNER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 239.

JOHN B. MURRAY AND JOHN W. BROWN, PLAINTIFFS IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1753

1 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court, before you or some of you, between Richard P. Lardner, plaintiff, and John R. Murray and J. W. Brown, defendants, a manifest error hath happened, to the great damage of the said defendants, as is said and as appears by their complaint: we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this 8th day of Nov'r, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

2 U. S. Supreme Court.

RICHARD P. LARDNER
vs.
JOHN R. MURRAY & J. W. BROWN.

By virtue of the within writ of error, and in obedience thereto, I, Kenneth G. White, clerk of the circuit court of the United States for the southern district of New York, do hereby certify and return the judgment and proceedings in the case in the writ within mentioned, and that the annexed return is a true copy of the record and proceedings aforesaid.

In testimony whereof, I have hereunto affixed the seal of the said [SEAL.] circuit court, this fourth day of December, in the year of our Lord eighteen hundred and sixty-two, and of the independence of the United States the eighty-seventh.

KENNETH G. WHITE, *Clerk.*

3 In the circuit court of the United States for the southern district of New York.

Pleas in the circuit court for the United States for the southern district of New York, held at the city hall of the city of New York, before the judges thereof, of the term of October, in the year one thousand eight hundred and fifty-eight—that is to say, of the ninth day of March, eighteen hundred and fifty-nine, as yet of the said term of October, 1858.

Witness the honorable Samuel Nelson, one of the judges of said court; ——, clerk.

In the circuit court of the United States for the southern district of New York, of October term, A. D. 1858, to wit, the ninth day of March of the same term of October, in the year one thousand eight hundred and fifty-nine.

SOUTHERN DISTRICT NEW YORK, *ss:*

John B. Murray and John W. Brown, who are citizens of the State of New York, were summoned to answer unto Richard P. Lardner, who is a citizen of the State of Pennsylvania, of a plea wherefore they unjustly detain three certain bonds of the Delaware and Raritan Canal and Camden and Amboy Railroad and Transportation Company,
4 numbered respectively 476, 477, and 478, for one thousand dollars each, payable in the year 1889, with coupons attached for payment of interest thereon, semi-annually, on the first days of June and December in each year; and thereupon the said Richard P. Lardner, by Evarts and Southmayd, his attorneys, complains of the said John B. Murray and John W. Brown, for that the said John B. Murray and John W. Brown, heretofore, to wit, on the twenty-eighth day of February, 1859, to wit, at the city and county of New York, received from a person to the plaintiff unknown, and whose name he is unable to state, who had come into the possession thereof by means of a theft from the plaintiff, three certain bonds belonging to the said plaintiff, duly made and executed by the Delaware and Raritan Canal and Camden and Amboy Railroad and Transportation Company, numbered respectively 476, 477, and 478, for the payment of one thousand dollars each, in the year 1889, with interest thereon in the mean time at the rate of six per cent. per annum, in semi-annual payments on the first days of June and December in each year, for which interest coupons were attached to said bonds, being of great value, to wit, of the value of three thousand dollars, to be delivered to the said plaintiff, when the said defendants should be thereunto afterwards requested: but the said defendants,
5 although thereunto often requested, had not delivered the same or either of them to the said plaintiff, but have refused and do refuse so to do, and have detained and continue to detain the same, to the damage of the said plaintiff of six thousand dollars, and therefore he brings, &c. And afterwards, that is to say, on the first Monday of April, in the year eighteen hundred and sixty, until

which day the said defendants had leave to to the said declaration, and then to answer the same before the justice of the said court at the city hall aforesaid, came as well the said plaintiff, by his attorneys aforesaid, as the said defendants John B. Murray and John W. Brown, by Raymond and Knox, their attorneys, and the said defendants defend the wrong and injury, when, &c., and say that they do not detain the said bonds in the said declaration specified, or any or either of them, in manner and form as the said plaintiff has above thereof complained, and of this the said defendants put themselves upon the country. And the said plaintiff doth the like, &c.

And thereupon the issue, so as above joined, between the said parties is ordered to be tried at a term of the said circuit court of the United States for the southern district of New York, to be held before the judges of the said court at the city hall, of the city of New York, on the first Monday of October, in the year eighteen hundred and sixty, and the same day is given to the said parties at the same place.

6 At which day and place last mentioned, that is to say, on the first Monday of October, eighteen hundred and sixty, at the city hall, in the city of New York, in the said circuit court, before the honorable Samuel Nelson, a judge of the said court, holding the same, came as well the said plaintiff as the said defendants, by their respective attorneys aforesaid, and the jurors of the jury summoned between the said parties being called, likewise came, who to speak the truth of the matters aforesaid being duly chosen, tried, and sworn, say, upon their oaths, that the said defendants are guilty of unjustly detaining from the said plaintiff the goods and chattels in the said declaration mentioned, that is say, the said three bonds of the Delaware and Raritan Canal and Camden and Amboy Railroad and Transportation Company, in manner and form as the said plaintiff has above thereof complained against them, and in pursuance of the statute in such case provided, they assess the value of the said goods and chattels, that is to say, the said three bonds in the declaration mentioned, at the sum of two thousand six hundred and ten dollars, and they assess the damages which the said plaintiff has sustained by the unjust detention from him hitherto by the defendants of the said three bonds, at the sum of three hundred and twelve dollars over and above the costs and charges by him about his

7 suit in this behalf expended, and for these costs and charges to six cents.

And because the said circuit court now here is not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid, to be before the said circuit court at the term thereof to be held at the city hall, of the city of New York, on the first Monday of April, in the year eighteen hundred and sixty-two, to hear the judgment of the said court thereupon, for that the said court is not yet advised thereof, &c.

At which day and p ace last aforesaid, that is to say, on the first Monday of April, in the year eighteen hundred and sixty-two, the said circuit court before the judges thereof, at the city hall, in the

city of New York, came the parties aforesaid by their respective attorneys aforesaid, and thereupon, all and singular the premises being seen, and by the said court now been fully understood, it appears to the said court that the verdict aforesaid, in form aforesaid given, is good and valid in law, and that the plaintiff ought to recover from the said defendants the said goods and chattels, that is to say, the three bonds aforesaid or the value thereof, if the same be not found to be delivered to him, together with his damages for the unjust detention thereof so as aforesaid by the jurors aforesaid assessed.

8 Therefore it is considered by the said court that the said plaintiff Richard P. Lardner do recover from the said defendants John B. Murray and John W. Brown the goods and chattels aforesaid, that is to say, the said three bonds in the said declaration mentioned, and that the same be replevied and delivered to the said plaintiff without delay; and in default of such delivery, or in case the same be not found upon execution so as to be so replevied and delivered to the plaintiff, then that the said plaintiff do recover from the said defendants the value thereof, so as aforesaid assessed, that is to say, the said sum of two thousand six hundred and ten dollars.

And it is further considered by the court, that the said plaintiff do also recover against the said defendants his said damages, costs, and charges, so as aforesaid by the jurors assessed for the detention hitherto from the said plaintiff of the said goods and chattels, and likewise the sum of four hundred and seventy-eight dollars and sixteen cents for the costs and charges by the said plaintiff in and about his said suit in this behalf expended, by the said court now here adjudged of increase to the said plaintiff with his assent, which said damages for such detention, with such costs and charges and costs of increase, together amount to thirty-four hundred dol-

9 lars and sixteen cents; and the said defendants in mercy, &c.

Judgment signed this 28th October, 1862.

R. E. STILWELL,
Deputy Clerk.

10 In the circuit court of the United States for the southern district of New York, in the second circuit.

RICHARD P. LARDNER
vs.
JOHN B. MURRAY and JOHN W. BROWN.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that in the term of October, in the year of our Lord one thousand eight hundred and fifty-eight, came Richard P. Lardner, by Evarts and Southmayd, his attorneys, into the circuit court of the United States for the southern district of New York, in the second circuit, before the justices thereof, and impleaded John B. Murray and John W. Brown, in a certain plea of detinue, in which the said plaintiff declared against the said defendants in these words:

In the circuit court of the United States for the southern district of New York, of October term, A. D. 1858, to wit, the ninth day of March of the said term of October, in the year one thousand
11 eight hundred and fifty-nine.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

John B. Murray and John W. Brown, who are citizens of the State of New York, were summoned to answer unto Richard P. Lardner, who is a citizen of the State of Pennsylvania, of a plea wherefore they unjustly detain three certain bonds of the Delaware and Raritan Canal and Camden and Amboy Railroad and Transportation Company, numbered, respectively, 476, 477, and 478, for one thousand dollars each, payable in the year 1889, with coupons attached for payment of interest thereon semi-annually on the first days of June and December in each year. And thereupon the said Richard P. Lardner, by Evarts and Southmayd, his attorneys, complains of the said John B. Murray and John W. Brown, for that the said John B. Murray and John W. Brown, heretofore, to wit, on the twenty-eighth day of February, 1859, to wit, at the city and county of New York, received from a person to the plaintiff unknown, and whose name he is unable to state, who had come into possession thereof by means of of a theft from the plaintiff, three certain bonds, belonging to the said plaintiff, duly made and executed by the Delaware and Raritan Canal and Camden and Amboy Railroad and Transportation Company, numbered, respectively, 476, 477, and 478, for the payment of one thousand dollars each, in the year 1889, with interest
12 thereon in the mean time, at the rate of six per cent. per annum, in semi-annual payments on the first days of June and December in each year, for which interest coupons were attached to said bonds, being of great value, to wit, of the value of three thousand dollars, to be delivered to the said plaintiff when the said defendant should be thereunto afterwards requested; but the said defendants, although thereunto often requested, have not delivered the same, or either of them, to the said plaintiff, but have refused and do refuse so to do, and have detained and continue to detain the same, to the damage of the said plaintiff of six thousand dollars, and therefore he brings suit, &c.

EVARTS & SOUTHMAYD,
Plaintiff's Attorneys.

To which said declaration the said defendants, by Raymond and Knox, their attorneys, pleaded with these words:

In the circuit court of the United States for the southern district of New York.

John B. Murray and John W. Brown, at the suit of Richard P. Lardner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

13 And the said defendants, John B. Murray and John W. Brown, by Raymond and Knox, their attorneys, come and de-

fend the wrong and injury, when, &c., and say that they do not detain the said bonds in the said declaration specified, or any or either of them, in manner and form as the said plaintiff has above thereof complained, and of this the said defendants, John B. Murray and John W. Brown, put themselves upon the country. And the said plaintiff doth the like, &c.

RAYMOND & KNOX,
Defendants' Attorneys.

And thereupon issue was joined between the said plaintiff and the said defendants. Afterwards, to wit, at a circuit court of the United States, held at the court-room of the said court in the city of New York, in and for the southern district of New York, on the twelfth day of November, in the year one thousand eight hundred and sixty, before Samuel Nelson, esq., circuit judge, appointed to hold the said court, according to the form of the statute in such case made and provided, the aforesaid issue so joined between the said parties as aforesaid came on to be tried by a jury of the district afore-
14 said, for that purpose duly empanelled, good and lawful men of the said district. At which day came there as well the said plaintiff as the said defendants, by their respective attorneys aforesaid; and the jurors of the jury aforesaid, empanelled to try the said issue, being called, also came, and were then and there in due manner chosen and sworn to try the same issue. And upon the trial of the said issue, the counsel for the said plaintiff, to maintain and prove the said issue on his part, called Richard P. Lardner, the plaintiff, who being duly sworn, testified:

I reside about nine miles from Philadelphia, near Orange, in the lower part of Montgomery county; I lived there in the winter of 1859–'60. I was the treasurer of a turnpike company; had an office in Walnut street, Philadelphia; Walnut street corresponds to the position of Wall street, in New York; I occupied one room in a house owned by the Pennsylvania Company for insurance on lives. The two front rooms, up stairs, were occupied by the Delaware and Chesapeake Canal Company; the back room of the second story was occupied by me; it was two rooms that I had the right of; the entrance to my room was from the landing on the stairs. There were two doors in the room, one entering the safe, flush with the room; four or five feet from that was a door leading into what had been a bath-
15 room. The safe projected in against the bath-room, but the door to the safe was in the main office. I purchased ten bonds of the Delaware and Raritan Canal and Camden and Amboy Transportation Company, January 22, 1859, of Mr. Charles H. Fisher, of Philadelphia. At the time of acquiring them I received from Mr. Fisher a memorandum of the numbers. They were Nos. 544, 476, 477, 478, &c. The memorandum is in the handwriting of Mr. Fisher or his clerk. I compared them with the bonds at the time, and checked off the numbers at the time of comparing. Have kept the memorandum in my pocket-book at my residence in the country. On afternoon of 23d day of February, 1859, I left my office. I had that day seen the inside of my safe and condition of my securities. All

right that day. I left at usual hour. Did not return to my office until Saturday, the 26th, when I was sent for by express, with information that safe had been broken open and securities stolen. My habit was, except in busy seasons, to go to the office Wednesdays and Saturdays; that was not a busy season. Went into office Saturday afternoon; came in in dusk of evening. The room in which I was accustomed to sit was as usual; door of safe all right, but the brick-work of the safe in the bath-room was all broken down, leaving large hole, big enough for a man to go in; unlocked safe, and found
16 the box in which the securities had been, broken open, and these ten bonds gone; found the envelope, in which they had been, lying on the floor of the safe. This was Saturday evening. Secured all that was left.

I called on Mr. Gan, a friend; went to mayor's office and made complaint; took a detective and gave notice to police; I had a notice printed and forwarded to New York, and distributed among the brokers there; also had notice inserted in the papers and forwarded to New York.

I came on to New York on Monday morning; saw my friend, Hopkins; went to the police office; saw a police detective, and disclosed the facts to him.

In the mean time I had heard that Murray had three of them; I called on him on the morning of March 1st, having taken advice of counsel the night before. I demanded them, and he refused to give them up, but gave me the numbers, and I checked them off, as in this memorandum. He said he had Nos. 476, 477, and 478.

When these bonds were stolen they were worth 87; now worth 86; since the robbery they have been as high as 91. It is a well-known security, one of the best known in Philadelphia. The stock of the company is from 28 to 30 above par. It is a security that does not vary much; a steady stock, often sold for investment and ad-
17 vance. My advertisements were in the Philadelphia Ledger and other papers.

The counsel for the plaintiff read in evidence the advertisement in the Philadelphia Ledger of February 28th, 1859, as follows:

STOLEN.—*Camden and Amboy railroad bonds.*—The following six per cent. bonds of the Camden and Amboy Railroad and Transportation and Delaware and Raritan Canal Companies were stolen from the fire-proof in the office of the undersigned, on the afternoon or night of the 23d instant:

Nos. 476, 477, 478, 484, 502, 503, 536, 537, 544, 545, of $1,000 each, redeemable 1889. Coupons payable 1st of June and 1st of December.

All persons are cautioned against negotiating the same, as payment has been stopped. Should any of the above-mentioned bonds be offered for sale, information of same to me, or to Gaw, Macalester & Co., Walnut street, will be thankfully received.

R. P. LARDNER,
N. 304 *Walnut Street* (*up stairs.*)

Philad., Feb. 28, 1859.

8

The burglary was also noticed in the money article of the same day.

The counsel for the plaintiff read in evidence the money ar-
18 ticle of same paper and date:

The public is cautioned against the negotiation of any one of ten coupon bonds of the Camden and Amboy Railroad Company of the following numbers, namely, 502, 503, 536, 537, 544, 545, 476, 477, 478, and 484, each redemable in 1889—coupons payable June and December in each year.

The said bonds were stolen from the fire-proof of R. P. Lardner, esq., on the night of the 23d instant. The payment of the bonds have been stopped by the proper notice to the company, but a service may be done the public, should any of them be offered, by detaining both the bonds and the parties until an examination may be had as to the honesty of the possession.

Any information on the subject to Gaw, Macalester & Co., brokers, will meet with attention.

A similar advertisement was inserted in the New York Times.

The counsel for the plaintiff then read said advertisement in evidence as follows:

STOLEN.—*Camden and Amboy railroad bonds.*—The following six per cent. bonds of the Camden and Amboy Railroad and Transportation and Delaware and Raritan Canal Companies were stolen from the fire-proof in the office of the undersigned during the afternoon or night of the 23d instant: Nos. 476, 477, 478, 484, 502, 503, 506,
537, 544, 545, of $1,000 each, redeemable 1889. Coupons
19 payable 1st June and 1st December.

All persons are cautioned against negotiating the same, as payment has been stopped. Should any of the above-mentioned be offered for sale, information of the fact to me, or to Gaw, Macalester & Co., of Philadelphia, will be thankfully received.

R. P. LARDNER,
No. 304 *Walnut St., Phila.*

Feb'y 26, 1859.

The counsel for the defendants then admitted that a similar advertisement had been published in the N. Y. Herald and Tribune of same date, and for six successive days.

The paper handed me is one of the handbills I had struck off.

The counsel for the plaintiff then read in evidence the said handbill:

STOLEN.—*Camden and Amboy railroad bonds.*—The following six per cent. bonds of the Camden and Amboy Railroad and Transportation and Delaware and Raritan Canal Companies were stolen from
the fire-proof in the office of the undersigned, on the after-
20 noon or night of the 23d instant: Nos. 476, 477, 478, 484,
502, 503, 536, 537, 544, 545, of $1,000 each, redeemable 1889. Coupons payable 1st of June and 1st of December.

All persons are cautioned against negotiating the same, as pay-

ment has been stopped. Should any of the above-mentioned bonds be offered for sale, information of the same to me or to Gaw, Macalester & Co., Walnut street, will be thankfully received.

R. P. LARDNER,
No. 304 *Walnut Street, up stairs.*

Philad., Feb. 28, 1859.

This was freely circulated in New York and Philadelphia. Gaw, Macalester & Co. are well known brokers and bankers in Philadelphia. I know nothing personally of the condition of the office between the 23d and 26th. My reasons for thinking that the robbery was committed the night of the 23d are, that the watchman kept in the next building said that on the night of the 23d he heard pounding—a noise like the breaking of a wall, which continued for some time, and he thought it was in some neighboring building.

The counsel for the defendants, to maintain and prove the issues on his part, then cross-examined the said Richard P. Lardner, and on such cross-examination he testified as follows:

21 My office was on the second floor. There was no access to my safe except through the main office. I don't know how a burglar could get to the safe except by picking my door lock. I don't know who left the room last. Benjamin Bell, the janitor, locked up the room always. I suppose he left last on Wednesday night. He kept the room in order and made the fires. He usually entered before I did. The wall entered was double; there was a space of four or five inches between the two walls; the inner wall was nine inches; the outer wall was about eighteen inches. They were brick and mortar walls. I had no assistant in the office, and no other person kept an office with me. I kept very little money in the office—sometimes a little small change. The robbery was discovered by the janitor, who went in to prepare for my coming next day. I suppose he went in on Friday night, or possibly not till Saturday morning. The express came out on Saturday morning. I did not go in on Saturday morning, because I was sick, but on arrival of the express, in the afternoon, I went to town.

The counsel for the plaintiff here rested his case.

22 The counsel for the said defendants, to maintain and prove the said issues on his part, recalled the said plaintiff Richard P. Lardner, who testified as follows:

I have been able to retrace others of the ten bonds besides these three; I traced five of them to the hands of Riggs & Co., of Washington, successors of Corcoran & Riggs. I have not traced the other two. Riggs & Co. are the largest banking house there.

The counsel for the plaintiff, to sustain the issue on his part, cross-examined the said Richard P. Lardner, and on such cross-examination he testified as follows:

The first knowledge I had of these five was in June last. I understood that they had got two in May of this year, and the other three later; they took them from a man named Moore, on a loan.

The counsel for the defendants, to maintain and prove the issues

on his part, called John B. Murray, one of the said defendants, who being duly sworn, testified as follows:

In February, 1859, my business was the negotiation of bonds and stocks at No. 40 Wall street, Manhattan Bank building; have been in that business about five years; my business was very large.

23 Prior to February, 1859, I had been familiar with these bonds, and that class of securities. I had been requested in 1858, by the company, to sell bonds for them; had an arrangement with them to dispose of $100,000 of them either on sale or on loans of money. I had frequent transactions, and was known in the street as the dealer in these bonds; loans were often made upon them. On the twenty-fourth of February, 1859, Kellogg & Parker, brokers, 64 Wall street, applied to me for a loan of two thousand dollars at ninety days upon three one-thousand-dollar bonds of the Delaware and Raritan Canal and Camden and Amboy Transportation Co., the three now in court. I asked for whom the loan was to be made. They handed me the address of Dr. A. D. Bates on a piece of paper. This was in answer to my question who wanted the loan. I told them I would let them know in the course of an hour or so.

This book is one in which I keep scraps, &c.

The counsel for the said defendant, to sustain the issues on his part, then read the said memorandum as follows:

A. D. Bates, Milford, Sussex, co., New Jersey.—90 days.

24 I went into the Manhattan Bank and asked the cashier if he would make this loan. Morrison, the cashier, asked the value that day; I gave him the quotation. Morrison insisted on making the time five days' call. I went down to Kellogg & Parker and told them I had arranged a loan of two thousand dollars on these bonds. Parker had left the bonds with me, and I showed them to the bank as is customary. Parker said they would bring their principal up to me as soon as he came in. They brought him up. Mr. Parker introduced him as Dr. Bates. I told him that I could not negotiate a loan at ninety days; that I had negotiated one at five days' call, but it would undoubtedly remain for ninety days. I said the loan was to be of two thousand dollars. He said, I am obliged to pay two thousand dollars to-morrow for some land I am buying in Jersey, and as I have to pay you a commission and Kellogg & Parker a commission, you must get enough out of the bonds to pay yourself and them, and give me net $2,000. I replied, I have made the loan of the Manhattan Bank, and we will step in there and see if they will increase the amount. I went in and asked Morrison if he would increase the amount, and he said they would to $2,100. I returned and drew the stock note which I now produce.

The witness then read in evidence the said note, as follows:

25 NEW YORK, *Feb'y 24th*, 1859.

Dolls. 2,100.

Five days after demand after date, without grace, I promise to pay to ——— or order twenty-one hundred dollars for value received, with interest at the rate of seven per cent. per annum, hav

ing deposited as collateral security hereto three joint bonds, $1,000, of the Delaware and Raritan Canal and Camden and Amboy R. R. Co., loan of 1854, payable in 1889, with this irrevocable authority to him and his assigns to use, transfer, or hypothecate the same, at his or their option, but at the sole risk of the undersigned. In case this note shall not be paid when due, the said payer and his assigns are hereby irrevocably authorized and empowered to sell and absolutely dispose of the said securities, or any part thereof, at his or their discretion, at the brokers' board, or at public or private sale, and in one or more parcels, without giving any notice, and to apply the net proceeds thereof to the payment of this note, with all interest due; and in case the proceeds of the said securities shall not cover the principal, interest and expenses, the undersigned promises to pay the balance on demand. On payment or tender of the amount loaned and interest on the day of the maturity of this note, an equal quantity of any stock or bonds hereby hypothecated is to be returned to the undersigned, and not necessarily the specific stock or bonds deposited, payable on five days' call, at the office of John B. Murray & Co., at or before 2 o'clock p. m.

A. D. BATES.

Demand made by letter, March 1, 1859.

HENRY B. MURRAY.

This note is endorsed as follows: 3,226. A. D. Bates. Feb'y 24, 1859. 5 days' call; $2,100.

This is the printed form of what is technically called a stock note or bond note. After this note was signed, I took the three bonds and the note into the Manhattan Bank, and handed them to the cashier.

He requested me to give him my note in addition, which I
26 did for $2,100. That I cannot find. He said it was the custom of the bank to place their loans to account of their dealers, and not to a stranger. Thereupon I lodged this note and my note and the three bonds. I can't remember which it was, a stock note or other, that I gave. On my return to the office, Dr. Bates requested me to retain one per cent. on the $2,000, or $20, and pay Kellogg & Parker $10 for their services; and I requested my cashier to draw a check for $2,070; which he did.

The witness then read the said check in evidence, as follows:

"John B. Murray, No. 40 Wall street.

NEW YORK, *Feb'y 24th*, 1859.

Bank of the Manhattan Company pay to the order of Henry M. Thompson two thousand and seventy dollars

$2,070. JOHN B. MURRAY & CO."

Endorsed: "Pay to the order of A. D. Bates.

HENRY M. THOMPSON.

A. D. BATES."

I should state that, in consequence of the extent of our business, we had an usage always to draw checks to the order of my cashier, Henry M. Thompson. He had been with me some years, and was my confidential clerk. Dr. Bates said he would like to draw the check at the bank. I requested Parker to go with him and identify him. Parker said he was not known; so I went in and said to the paying teller, this is right. I then paid Parker the $10.

On the Tuesday or Wednesday following I heard of the rob-
27 bery, and went to Kellogg & Parker and told Parker that he had introduced a thief. He gave me back the ten dollars, and said he could not keep it if it came from a thief. Kellogg & Parker are of good standing; I would do any business with them; I considered their introduction sufficient.

I asked Dr. Bates if he knew persons here. He said, yes—several ladies and gentlemen. I asked him if he knew any physicians. He said, yes—Drs. Mott and Parker, very well known men. He said he did not know Dr. Hosack, my family physician, for he, Bates, was of the old school, and Hosack was with the new. I asked him if he knew Dr. Riggs, of New Jersey, of whom I had received a good many securities. He said he did by reputation.

Dr. Bates was handsomely dressed; very well dressed; a gentlemanly man; manners unexceptionable; answered questions without hesitation.

The value of the bonds, that day, was 86; about $2,500 or $2,600.

I first received intimation that the bonds had been stolen on Tuesday morning, following. Mr. Lardner called in and stated that he understood that I had the bonds. I gave him all the particulars, and said I was sorry that he had lost them in that way; but I had
28 negotiated them to a bank, and could not get them. I received a printed circular on the first of March; I pasted it into this scrap-book. I asked Dr. Bates where he bought or received these bonds. He stated that he had bought them of Mr. Lardner. I had not the pleasure of knowing Lardner. I had been notified that Charles Henry Fisher, of Philadelphia, had bought $300,000 of these bonds, and they (the R. R. company) did not wish to raise more money. I had not heard Lardner's name mentioned before in connexion with the bonds of this company.

I made inquiries as to who Lardner was, and learned that he was a man of wealth and position in Philadelphia. When Lardner demanded the bonds of me, they were still lodged with the Manhattan Bank. I told Lardner they were with a bank; but he did not ask what bank, nor did I state. Before going into the bank to deposit this stock note, I had stated to Parker to mention to his principal what commissions I should charge on the transaction.

The counsel for the plaintiff, to maintain and prove the issues on his part, then cross-examined the said John B. Murray, and on such cross-examination he testified as follows:

At this time my business in Wall street was that of a broker in securities; buying, selling, and loaning money. I had been in

29 this office since U. S. Trust Co. went out, some time before.

Entries were made of this transaction, first in check-book, then in cash-book, by the clerk, before he left that night; from thence the transfer is to the journal; thence to ledger. My books are all here.

The handwriting of the entries in the check-book is that of my clerk and myself.

The witness then read the entry in the check-book of the transaction, as made by his clerk, as follows:

A. D. Bates,

Per Manhattan Co., loan of 24th Feb'y, made for his account, 2,100; interest, 95 days, 5 per ct., 27 71; May 30th, 1859, $2,127\frac{71}{100}$.

This is the clerk's entry of the transaction, as originally made by him.

The witness then read in evidence another entry made in the check-book, by his said clerk, as follows:

A. D. Bates:

Loaned *a* 5 d'ys' call; p'd him for his stock note for 2,100, due *a* 5 d'ys call.	2,080
Less com. p'd Kellogg & Parker for his order	10
	2,070

30 That is the transaction, as it was entered in the first instance. That was my clerk's entry, but was not the transaction. The erasures and interlineations were made by my directions upon my return from the bank. The words "at 5 days' call, &c.," on the check side, are in my handwriting. On the other side, "paid A. D. Bates, &c.," are in my hand also. I think I erased the words "for 2,100, &c.," and less com. p'd K. & P." I should think I erased them from the difference of ink. My clerk used plain ink; I used copying ink. His ink, you see, is a little more blue. It was customary for me to make corrections. These changes were made before the business of the day was over. The first entry by the clerk was made after I had closed the transaction at the bank. After my last visit to the bank, nothing new happened between me and the bank after the first entry of the clerk was made.

(The witness then produced his cash-book.)

This entry was the transfer from the check-book. This was made that night before the cashier left.

The witness then read the entries in his cash-book, relating to this transaction, as follows:

A. D. Bates p'd for his stock note, *a* 5 days' call, for 2,100.	
Less com. for negotiating, 20.	
" p'd Kellogg & Parker, by his order, 10—30	2,070
A. D. Bates p'd Kellogg & Parker, by his order, their com'n on loan of $2,100 on 3 Cam. and Am. b'ds	10

31 That cash-book entry is posted in the ledger account of A. D. Bates. Bates is debited with the $2.100, and credited with $2.100. This entry was also made immediately—same night.

In the journal there is a simultaneous entry, showing what the twenty dollars was for. I paid the Manhattan Company the money they had loaned about 90 days after the transaction. They gave me back the collaterals. I have lost my note. When a note is handed back without any endorsement, I do not usually keep it. I suppose it contained no mark of payment, and I therefore destroyed it. I paid $2,177 71, May 30, 1859.

On the first of March, 1859, I was notified that the bonds had been stolen. I immediately made a formal demand, by mail, addressed to Dr. A. D. Bates, Milford, Sussex county, New Jersey; I never received any answer or communication.

I have been obliged, since the thirtieth of May, to carry them, in consequence of Dr. Bates not making good the loan. I have borrowed on them from time to time; have had possession of them always, except when they have been pledged on loans to myself. They are now in the Pacific Bank as collateral for a loan to me.

I have never seen or heard of this Dr. Bates since. I have since
32 inquired about Milford, and find that it is in Pennsylvania, on the borders of New Jersey, but not in New Jersey. At the time of the transaction I did not make any inquiries as to this place. I did not inquire of Dr. Bates how long he had had them, nor when he had got them. I made no inquiries about Bates at the time. I referred to none of the persons whom Dr. Bates named. I don't remember of whom I inquired about Lardner. My first impulse was to write to Philadelphia; I wrote to my bankers, E. S. Wheelan & Co.; did not wait for an answer. I can't give the name of any person of whom I inquired about Lardner. I found out that he was R. P. Lardner. I first got from Dr. Bates, or Kellogg & Parker, I am not certain which; only a Mr. Lardner, without initials.

It is always my custom to know from whom securities come before dealing; it is the custom of brokers, &c. I did not think it necessary to inquire about Bates, because he was introduced to me by Kellogg & Parker. Kellogg & Parker did not say that they did not know Mr. Bates, not to the best of my recollection. If they had, it would have excited suspicion in my mind, and I would have had nothing to do with it.

Afterwards, when the conversation occurred about identifying Bates at the bank, Parker, when asked to go, said that they did not know him at the bank—not that he did not know
33 Bates.

The counsel for the plaintiff, to sustain the issues on his part, then read the letter of John B. Murray to E. S. Wheelan & Co., as follows:

NEW YORK, *Feb'y* 24, 1859.

MESSRS. E. S. WHEELEN & CO.,
Philad.:

Your favor is at hand, with enclosures stated.

Will you do us the favor to inquire of a Mr. Lardner if he sold to Mr. A. D. Bates, of Milford, Sussex co., N. J., 3 joint six per cent. bonds, Nos. 476, 477, 478, of Del. and Rar. Canal and Camden and Amboy R. R. Co., and whether he is a man of responsibility?

Your early answer will oblige us. We do not know who Mr. Lardner is, but presume that you do.

Very truly yours,

JOHN B. MURRAY & CO.

That letter I wrote to Wheelan, a first-class banker on the 24th. It was on Kellogg & Parker's introduction that I relied as to Bates. He mentioned other parties, but I did not refer to them. Dr. Bates said he wanted $2,000 to make a payment on real estate next day, and therefore he wanted enough to cover commissions. He did
34 not say for what purpose he had bought the bonds. I wish to correct: The loan first applied for was $2,250, but Mr. Morrison thought that $2,000 was quite enough. I did not ask or know as to Bates being a physician settled at Milford. He had the appearance of being a gentleman.

One-quarter per cent. is the usual commission for negotiating loans on securities sold at the board of brokers; but one-half or one per cent. on securities for which I must go elsewhere to realize.

Ques. What do you, as a broker negotiating a loan on securities, have to do with selling the securities?

Ans. If the securites are salable at stock board here, I have nothing to do with their sale; but with other securities I might have something to do.

These coupons were full when I took the bonds. The coupons cut off, hitherto due, are all in my possession. My inquiries about Lardner were casual, made of bankers and brokers whom I met in the streets.

Mr. Parker called upon me at about ten o'clock in the morning. He said he wished to obtain a loan of $2,250 on Camden and Amboy bonds; application had been made to him; he wished the money. I cannot say whether he applied for me to loan. I said I would try and see what I could get. I do not recollect saying that I
35 would loan it at seven per cent. When I went back I said that I could obtain $2,000 for him upon the securities at five days' call. I have no recollection of saying that I would make the loan for seven per cent. and one per cent. commission. Parker handed me the paper, and said that the man was Dr. Bates; I have no recollection of his saying that he represented himself as being Dr. Bates, but was an entire stranger to him. I have no recollection of asking Parker as to whether Bates could give city references. I don't recollect that there was any conversation between us as to

how Bates came by the bonds. My impression is, that I saw Bates at my office last; I do not think I saw Bates anywhere before that. Parker could not have said that the man represented himself as being Dr. Bates, but was an entire stranger to him. He could not have told me that he inquired as to city references, but he had none.

The counsel for the defendants suspended the re-examination of the witness, that the counsel for the plaintiff, further to sustain the issues on his part, might call James M. Morrison, who, being called and duly sworn, testified as follows:

I am president of the Manhattan Bank; was cashier last
36 year until Halstead's death this fall. I was acquainted with these securities. The company is in fair credit. The Manhattan Company made a loan to Murray on three of the bonds. These securities are generally known.

Witness produced an extract from the books of his bank, which extract was by the counsel of the respective parties admitted as evidence instead of the books, and read by the witness, as follows:

FEB'Y 24, 1859.

Notes receivable. To sundries.

John B. Murray & Co., per their note 5 days at "A," after demand, p'ble with int't at 7 per c't.

Coll. sec'y.

3 joint bonds, $1,000, Camden and A. and Del. and Raritan C. Co., due 1889. A. D. Bates's note for $2,100, same date and tenor.

The loan was to Murray, at the rate of seven per cent. Bates's note was collateral. The loan was on Murray's note, and was made to him personally. The note of Bates and the three bonds were collateral to Murray's note, and the money was charged to Murray. We had nothing to do with Dr. Bates, and he was not a party to the transaction with us, except as a collateral. I put away the securities and carried the loan to Murray's credit, until I called in the
37 money. The interest was calculated, and he paid me the interest $27 $\frac{7}{10}$, which is five per cent. Money was easy at that time. That closed the whole transaction between Murray and me.

The counsel for the defendants, further to sustain the issues on his part, then cross-examined the said James M. Morrison, and on such cross-examination he testified as follows:

I have no recollection of the transaction independent of the memorandum, and that tells the whole story. Murray has made a great many loans of me from time to time, and after a loan is repaid my memory is only in my books.

The counsel for the defendants then resumed the examination of John B. Murray, who testified as follows:

Ques. How came the alterations to be made in the margin of your check book?

Ans. It was the rule of my office always that entries of all transactions should be explained by me to my clerks, for I made trans-

actions out of the office which they knew nothing about; so, according to custom, I went to examine the check book and found the errors in these entries. The reason why five per cent. only was
38 paid to the Manhattan Company was, that although the rate rate of seven per cent. was printed on the face of my stock notes, Mr. Morrison always charged interest at the current market rate, whether at five or six per cent. In this case he said it was worth but five per cent.

The counsel for the defendants, further to sustain the issues on his part, called Henry M. Thompson, who, being duly sworn, testified as follows:

In 1859 I was cashier and bookkeeper for John B. Murray. I made the original entry in the check book. The alterations were made by Murray before the day closed. He always looked over the check book and corrected entries made erroneously. I made the erasures on the same day.

The counsel for the plaintiff, further to sustain the issues on his part, then cross-examined the said Henry M. Thompson, and on such cross-examination he testified:

The entries in the margin of this check book are, most of them, made by me. Generally I made entries from what knowledge I had of the various transactions. If I knew nothing, I would inquire before three o'clock of Murray, and put in the filling up—certain classes of transactions I knew about when made, and others
39 not.

The witness then read the entry in the check book, as follows:

A. D. Bates. Paid him for his stock note, at 5 d'ys call		$2,100
Less com. and negotiation	$20	
P'd Kellogg & Parker, by his order	10	
		30
		2,070

I don't really know how I knew what to enter. If no alterations had been made the entry would have been all right and complete. I don't remember whether I drew any of the papers in this transaction; I think I drew another stock note for $2,000 while the transaction was going on. I knew Bates was brought in by Parker, and I understood that he wanted a loan. Murray went out and went towards Manhattan Co., and came back and said the bank would take the loan.

The counsel for the defendants, further to sustain the issues on his part, then re-examined the said Henry M. Thompson, and on such re-examination he testified as follows:

Alterations of the entries frequently occur in the course of business. I saw Bates in the office only once; that was when I
40 gave him the check.

The defendants' counsel here rests his case.

And thereupon the counsel for the plaintiff, further to sustain the issues on his part, called William Parker, who, being duly sworn, testified as follows:

I am one of the firm of Kellogg & Parker; 64 Wall street was our place of business in 1859. We commenced as brokers in 1856. Our business was, principally, that of negotiating loans.

On the morning of the 24th of February, 1859, a man came into my office, No. 64 Wall street, and proposed to borrow about $2,000 on three of these bonds. I asked him who he was; and he said he was Dr. A. D. Bates, of Milford, Sussex county, New Jersey. Had some conversation with him. By arrangement with him I took the bonds to effect a loan for him. By inquiry I found Murray dealt in that security, and proposed to him to borrow $2,250; gave the memorandum. Murray said he knew the bonds very well, and thought he could make or effect the loan, and wished me to leave the bonds with him for a short time. I made a written memorandum about a week after the loan, when I saw there was to be trouble.

Witness produces memorandum and refreshes his memory
41 therewith.

I asked Murray at what rate. He said seven per cent. I had the bonds with me, and left them with Murray. He said he would call down at my office. He did so. He then said he would make a loan of $2,000 for 90 days; but, as was his custom, he would draw the note at 5 days' call to guard against depreciation of securities. He said he would make the loan at seven per cent., but as he would have to borrow the money, he would have to charge one per cent. in addition brokerage. At this interview I said to Murray that Bates was a stranger to me or to our firm. Murray said to that, he would have to satisfy him how he came by the bonds before he could make the loan. Murray asked me whether Bates had any city references. I told Murray that I had already asked Bates that question. He had no city references, but knew only physicians. Am confident that I stated to Murray that Dr. Bates told me he had bought the bonds for investment, and now wanted the money to pay for lands he had bought. Murray went back to his own office. After awhile Bates came in. I stated to him the terms of the loan. I went with
him to Murray's office. I introduced him to Murray. It was
42 towards three o'clock. Murray asked him of whom he got the
bonds. He said of Mr. Lardner, of Philadelphia. I think he said "Mr. Lardner." Nothing else. Murray asked him if he was acquainted in the city. He replied, he supposed, if he had time, he could find a dozen people in the city that knew him—ladies and gentlemen. Murray asked him if he knew any physicians. He said, Dr. Mott; may have mentioned others. Murray asked him if he knew some physician in New Jersey with whom he had had some dealings. He said he did not. He told Murray what he wanted the money for. Murray told him he would loan him the money on the terms he had named to me. A note was drawn for $2,000, out of which Murray proposed to take the commissions. Bates objected. He wanted

$2,000. Murray then said he would lend $2,100: and then the check was given. I don't remember the amount. It was over $2,000. The check was on the Manhattan Bank, in same building. Murray told Bates to go to the bank and draw the money. I went, at Murray's suggestion, into the bank to identify Bates. After I got in there, there were several persons at the paying teller's counter. While we were waiting there, I went back to Murray and told him I was not known at the bank. Murray then went into the bank. I had no knowledge of Dr. Bates, except what I learned that morning.

43 I stated distinctly to Murray what I have stated about my ignorance of Bates. I do not recollect anything else that I stated to Murray as to my knowledge of Bates, except as before stated.

The counsel for the defendants, further to sustain the issues on his part, then cross-examined the said William Parker, and in such cross-examination he testified as follows:

I charged a brokerage of ten dollars, and received it from Bates. It came out of the loan. I acted for no one else but Bates. One quarter per cent. is the usual commission for negotiating a loan in Wall street, with or without securities. I received the ten dollars from Dr. Bates. I made this memorandum, because I heard from Murray that the bonds were stolen. I felt a little nervous about it. Murray said that he should charge one per cent. commission. One per cent. is not an unusual commission among men doing this kind of business.

Bates was quite gentlemanly in appearance; well dressed; quite intelligent. The application was not an unusual one; occurs often; not every day. Applications from strangers are common. Bates paid me nothing but the ten dollars.

44 The counsel for the plaintiff, further to sustain the issues on his part, then re-examined the said William Parker, and on such re-examination he testified as follows:

I say that one per cent. is not an unusual commission, because I am in the habit of bargaining for more. It is not at all unusual for brokers to make a charge of one per cent. for negotiating loans, even when money is easy, upon collaterals that are accredited.

The counsel for the plaintiff, further to sustain the issues on his part, called Robert Buck, who, being duly sworn, testified as follows:

I am cashier of the Pacific Bank. On the twenty-second day of August, 1860, we loaned Murray two thousand dollars, at ninety days, taking as collaterals these three bonds and his note. These bonds are in my custody as cashier. They belong to the bank. We consider them good. They are tolerably well known in this market. The bonds are payable to R. F. Stockton, or bearer.

The counsel for the plaintiff, further to sustain the issues on his part, then read in evidence the letter of Murray to Dr. A. D. Bates, as follows:

45 NEW YORK, *March* 1, 1859.

A. D. BATES,
Milford, Sussex Co., N. J.:

SIR: We hereby demand payment of your stock note for twenty-one hundred dollars, with interest at seven per cent. from 24th February, according to the terms thereof.

Yours, &c.,

JOHN B. MURRAY & CO.

The counsel for the plaintiff here rested his case.

Whereupon the counsel for the defendants then and there requested the court to charge the said jury:

First. That it does not appear by the evidence in the case, that either of the defendants had any knowledge or notice that the bonds in question had been stolen, and that the defendants were, therefore, entitled to a verdict.

The court refused so to charge, as above requested, and the counsel for the defendants then and there duly excepted to the said refusal.

46 Second. That there were no such suspicious circumstances attending the transaction between Bates and Murray as to put Murray on inquiry, and Murray is not chargeable with bad faith by any omission on his part to inform himself in regard to the bonds, and Bates's title to them, further than he did.

The court refused so to charge, and, as above requested, the counsel for the defendants then and there duly excepted to the said refusal.

And the court then and there declared and delivered its opinion to the said jury, as follows:

Gentlemen of the jury: This suit, as you have already learned, is brought for the recovery of three railroad bonds, and they have been given in evidence here. The value, at the time of the demand made by the plaintiff upon the defendant, according to the evidence, amounted to $2,610; the bonds being at the time worth in the market eighty-seven per cent. These bonds were stolen from the plaintiff, and came into the hands of the defendants, as a broker in this city, for the negotiation of the paper in the way or for the purpose of raising a loan of money. There is no dispute but that the defendant or de-

47 fendants received the bonds in the character mentioned, as a broker, for the purpose of negotiating them; nor is there any dispute but that these bonds were stolen from the plaintiff. These are matters not in controversy. The case, therefore, turns upon the defence set up on the part of the defendants, and that is, that they received the bonds in good faith and for value, for money advanced, and without notice of the theft, without notice that they were stolen; and, gentlemen, we instruct you, as matter of law, that if the facts, in your judgment, make out this ground of defence, the defendant is entitled to your verdict. He has obtained a title to the property, which is protected by law. These bonds were negotiable, resembling in this respect promissory notes, bills of exchange, or other negotia-

ble paper, which has a wide circulation in this commercial community and in others, and has long been the means of raising funds at home and abroad for the execution and carrying into effect most of the important enterprises of the day in this country; and the announcement, as matter of law, that the bona fide owner of a note or bond of this description was not protected by law, but that the bond was subject to any latent or hidden defect, like the one in question, or any other of the kind, would shake the foundation of these
48 securities, both in this country and abroad, and alarm capitalists who have sought these securities for the purpose of an investment for their money. The question in the case, therefore, is, whether the defendant received these bonds in this character—that is, in good faith. It is admitted that he paid value for the paper—an advance of money; and this reduces the inquiry to the single point as to the bona fides; in other words, to the question as to whether he had notice of the theft at the time that he negotiated the paper; and the question has been made by the learned counsel for the parties as to the description of notice that would deprive the defendant of the character of a bona fide purchaser of the paper. And this, no doubt, is a subject of considerable importance with respect to the question between these parties. *The notice, according to the settled law of the land, in general terms, must be express, or its equivalent. That is, in the absence of express notice, direct notice, there must be circumstances of suspicion accompanying the transaction, so strong and apparent, as to lead a man of ordinary prudence to see that there was something wrong or out of the way in the matter.*

(To which portion of the said opinion in italics the counsel for the said defendants did then and there, on behalf of said defendants, duly except.)

The foundation of the rule of bad faith in a transaction of
49 this character is the notice or knowledge of the defect coming home, or being brought home to the defendant, or to the party, at the time that he receives the paper (in this case of the theft,) notice or knowledge of the theft. This notice or knowledge received by the party taking the paper taints the transaction; so that, as between a person in possession of it and an innocent party, the loser of the property, the equity and justice of the case is with the latter. One party is innocent; the other party is charged with a knowledge of the wrong committed. Now, it is admitted and conceded upon the proofs in the case, that no direct notice of the defect in the title of this paper had been brought home to the defendant. So far, therefore, as the question of notice or knowledge of the defect is concerned, or knowledge of the theft, it depends upon the circumstances which have been detailed to you by the witnesses, giving you the whole history of the transaction, and commented upon by the learned counsel for the respective parties. *And the question in the case is this: whether, upon the circumstances, taking them altogether, taking the whole transaction altogether, whether these circumstances are so strong, so apparent in respect to the transaction, in respect to the good faith of the transaction to the persons who presented the paper for nego-*

tiation to the defendant, were such as to lead a man of ordinary
50 *prudence or ordinary care to see that there was something out of the way, something beyond the usual circumstances attending a negotiation of this kind, something wrong in the operation in the transaction.*

(To which portion of the said opinion in italics the counsel for the defendants did then and there, on behalf of said defendants, duly except.)

Now, gentlemen, I am not going over the evidence bearing upon this point. All I desire is, to put you in possession of the question of fact, and the law applicable to the testimony bearing upon it. There is one fact, however, that I feel bound to call your attention to, as entitled to consideration—how much, it is for you to determine, and that is, that the defendant in this case pledged his own responsibility to the bank, who advanced the money upon the credit of these bonds, showing, therefore, as far as this act upon the part of the defendant may be considered as tending in that direction, the confidence of the defendant in the integrity of the transaction.

These, gentlemen, are all the observations I deem of importance to submit. *It will be for you to say whether the defendant has made out, as the burthen lies upon the defendant, whether he has made out that he received this paper in good faith, without any notice of the defect of the title, in other words, of the theft from the plaintiff, or whether there*
51 *were circumstances of the character which I have described to you as would warrant the inference that there was ground of suspicion, and that he should have made further inquiry as to the character of the paper.*

(To which portion of said opinion in italics the counsel for the said defendants did then and there, on behalf of said defendants, duly except.)

If you are satisfied that he received the paper in good faith and for full value, then he is protected under the rules of law which I have stated to you. If he did not, the plaintiff is entitled to your verdict.

Mr. Evarts. In your views, presented to the jury, your honor has not adverted to the ordinary course of business.

Judge Nelson. Well, I meant to include that. I suppose I did. It must be a transaction in the ordinary course of business.

And because none of the exceptions so offered and made to the opinion and decision of the said circuit judge do appear upon the record of the said trial, therefore, on the prayer of the said defendants, by their counsel, the said circuit judge hath to this bill of exceptions put his seal, this 24th day of October, in the year of our Lord one thousand eight hundred and sixty-two.

(Signed) S. NELSON.

52 Endorsed: U. S. circuit court, southern district of New York, in second circuit. Richard P. Lardner *ag'st* John B. Murray *et al.* Bill of exceptions. Henry E. Knox, def'ts' att'y. Filed Nov. 8, 1862.

53 Supreme Court of the United States.

RICHARD P. LARDNER
ag'st
JOHN B. MURRAY and JOHN W. BROWN. } In error.

Know all men by these presents, that we, John B. Murray, James B. Murray, and Cambridge Livingston, of the city of New York, are held and firmly bound unto the above-named Richard P. Lardner in the sum of four thousand dollars, to be paid to the said Richard P. Lardner, his executors or administrators; to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, dated this fifth day of November, in the year of our Lord one thousand eight hundred and sixty-two.

Whereas the above-named John B. Murray hath prosecuted
54 a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit of the United States for the second circuit and southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named John B. Murray shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation to be void; otherwise, the same shall be and remain in full force and effect.

JOHN B. MURRAY. [L. S.]
JAS. B. MURRAY. [L. S.]
CAMBRIDGE LIVINGSTON. [L. S.]

Sealed and delivered in the presence of—
JOSEPH BRIDGHAM.

Taken and acknowledged before me this fifth day of November, 1862.

JOSEPH BRIDGHAM,
United States Commissioner, Southern Dis. of New York, 2d Circuit.

55 UNITED STATES OF AMERICA,
Southern District of New York, ss:

James B. Murray and Cambridge Livingston, being duly sworn, depose and say, and each for himself saith, that they reside in the city of New York, and are each worth the sum of eight thousand dollars over and above all their just debts and liabilities.

JAS. B. MURRAY.
CAMBRIDGE LIVINGSTON.

Sworn to before me this 5th day of Nov., 1862.

JOSEPH BRIDGHAM,
U. S. Commissioner, Southern District of New York, 2d Circuit.

Endorsed: Supreme Court of the United States. Richard P. Lardner *ag'st* John B. Murray and John W. Brown. Bond on writ of error. Approved Nov. 7, 1862. S. Nelson.
Filed Nov. 7, 1862.

56 By the honorable Samuel Nelson, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To RICHARD P. LARDNER:

Whereas a writ of error lately issued out of the Supreme Court of the United States, directed to the judge of the circuit court of the United States for the southern district of New York, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court, before the judge thereof, between Richard P. Lardner, plaintiff, and John B. Murray and J. W. Brown, defendants, a manifest error hath happened to the great damage of the said defendants:

And whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated Supreme Court of the United States, to be held at the city of Washington on the first Monday of Dec. next, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the said first Monday of Dec'r next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the eighth day of November, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh.

S. NELSON.

Filed November 8, 1862.

Supreme Court of the United States.

DECEMBER TERM, 1864.

No. 118.

JOHN B. MURRAY *et al.*, PLAINTIFFS IN ERROR,

vs.

RICHARD P. LARDNER.

BRIEF FOR PLAINTIFFS IN ERROR.

This is a writ of error to the Circuit Court of the United States for the Southern District of New York.

The case is thus:

Lardner was the owner of three bonds of the "Delaware and Raritan Canal and Camden and Amboy R. R. and T. Co." He resided in the country, about nine miles from Philadelphia, and had an office in that city, where he went to transact business two days in the week, Wednesdays and Saturdays. (*Rec.* pp. 6, 7.)

Murray was a broker, engaged in the negotiation of bonds and stocks, at No. 40 Wall street, Manhattan Bank building. (*Rec.* p. 10.)

On the night of Wednesday, the 23d February, 1859, Lardner's fire-proof was broken open, and those bonds were stolen. The theft was not discovered till Saturday, the 26th. Information of it was conveyed to Lardner in the country, and that evening he went to Philadelphia, and took such measures as he thought necessary for the recovery of his property, and to caution the public. Notices appeared

in the Philadelphia Ledger and in leading New York papers on Monday, the 28th.

In the meantime, however, the morning after the theft, to wit, Thursday, the 24th, two days before the discovery of it, (Saturday, the 26th,) and four days before the first notices in New York, (Monday, the 28th,) these bonds were negotiated to Murray, at his office in Wall street, in the usual course of business, and for full value.

This general statement of the case is made upon the testimony of plaintiff and defendant respectively, and the other brief evidence, all of which will be found in the record at pp. 6–20.

There were ten bonds stolen from Lardner, three only of which were held by Murray, who having furnished their numbers to Lardner, the latter brought this action, which is in form *detinue*.

The instructions prayed by Murray, and refused by the Court, are at p. 20, together with the exception to the refusal.

The charge of the Court is on the same page *et seq.*, with exceptions to specific portions thereof.

The bonds were ordinary coupon bonds, payable to bearer, such as are now firmly settled to be negotiable paper, entitled to all the immunities which, under the commercial law, attach to that species of security.

POINTS.

It will be respectfully submitted that the judgment ought to be reversed, because

I.

There was no evidence *tending* to show knowledge, notice, or even reasonable grounds of suspicion, that the bonds were not the property of the person who negotiated them to Murray, nor any evidence *tending* to show that they were not negotiated by him *bona fide*, and in the usual course of business.

This proposition will require a critical examination of the evidence, which may be more easily and advantageously made in this Court, upon the printed record, than on a trial at *nisi prius*. It is appropriate, however, to the oral argument.

If it be made out to the satisfaction of the Court, it must

follow that there was error in submitting Murray's title to the verdict of a jury, who, by such submission, were empowered to dispose of his rights *without any evidence*, but simply as their notions of natural justice, without regard to the rules of law, might dictate.

II.

Supposing the first proposition to fail, and that there was a *scintilla* of evidence to the effect that Murray had, at any moment, doubts as to the title of the party with whom he was dealing; or that he had, during the negotiation, a suspicion that (in the language of the court below) "*there was something wrong or out of the way in the matter*," (p. 21 ;) or that the circumstances "*were such as to lead a man of ordinary prudence or ordinary care, to see that there was something out of the way*," &c., (p. 22.)

Then, it will be respectfully submitted that the charge of the court below is in direct conflict with the law, as finally settled by this Court upon this *questio vexatissima*, in the case of Goodman *vs.* Simonds, 20 How., 343.

In that case all the varying authorities, not only in this country, but in England, and all the reasoning upon which their differing theories had been founded, were most learnedly and laboriously reviewed, and philosophically collated and analyzed, so that to attempt to throw further light upon the subject seems vain. Accordingly, it is not proposed to refer to any other authority than the opinion of Mr. Justice Clifford, speaking for the whole court in that case, where it was held to be error to have charged the jury that "if *such facts and circumstances were known* to the plaintiff as *caused him to suspect*, or as would have caused one of *ordinary prudence to suspect* that the drawer had *no interest* in the bill, &c., or right to *use the bill for his own benefit*, and by *ordinary diligence he could have ascertained*, &c., then they must find for the defendants." That is, against the party affected by the *knowledge* of *facts and circumstances* which actually *did cause* him *to suspect*, and *ought to have caused* him or any other prupent man to suspect, the vice in the title of the holder with whom he was dealing.

If this unanimous judgment of this court is to stand, it is submitted that the judgment below cannot stand with it, but must be reversed.

J. M. CARLISLE,
Of Counsel for Plaintiff in Error.

(No. 118.)

SUPREME COURT, UNITED STATES.

DECEMBER TERM, 1864.

RICHARD P. LARDNER, *Defendant in Error;* ADSM., JOHN B. MURRAY and JOHN W. BROWN.	In Error to the Circuit Court of the Southern District of New York.

THIS suit was instituted in the Circuit Court of the Southern District of New York in March 1859. Plaintiff claimed three certain bonds as his property, of the Delaware and Raritan Canal and Camden and Amboy Railroad Transportation Company, for the payment of $1,000, each payable with interest, for which interest payments coupons were attached. Defendants pleaded the general issue, and the case came on for trial in October, 1860. The jury, under an instruction from the Court, found a verdict for plaintiff for the sum of $2,610, and damages $312. From the record it appears that no judgment was rendered upon this verdict from October, 1860, until October, 1862, when the presiding judge sealed the bill of exceptions. [p. 22.]

It is supposed that judgment was suspended in consequence of a motion for a new trial, and that the bill of exceptions was not sealed at the time of the trial, but kept open until the overruling of the motion to set aside the verdict. If such be the case, it is a practice peculiar to New York, and directly repugnant to that recognized by this Court.

It is of course unnecessary for me to advert to the origin and history of the bill of exceptions and the practice under it as well in England as in this country. But in 1824 a case occurred in this Court, in which the principles which prevailed in the Courts of the United States were distinctly expressed. In *Walton* v. *United States* (9 Wheat. 657) this exposition will be found.

In that case the exceptions were to the admissibility of testimony in this, to the charge of the Court to the jury. The language however of this Court is equally applicable to both cases. "It is a settled principle that no bill of exceptions is valid which is not for matter excepted to at the trial. We do not mean to say that it is necessary, and in point of practice we know it to be otherwise, that the bill of exceptions should be formally drawn and signed before the trial is at an end. It will be sufficient if the exception be taken at the trial and noted by the Court with the requisite certainty, and it may afterwards *during the term*, according to the rules of the Court, be reduced to form and signed by the judge, and so in fact is the general practice. But in all such cases the bill of exceptions is signed *nunc pro tunc*, and it purports on the face to be the same as if actually reduced to form, and signed pending the trial. And it would be a *fatal error* if it were to appear otherwise; for the original authority, under which bills of exception are allowed, has always been considered to be restricted to matters of exception taken pending the trial and ascertained before the verdict."

In that case the reporter does not inform us from what Circuit the case was brought up, though it may be inferred it was from the Mississippi District. On the other hand, there is no intimation that in stating what the regular and established practice is, any reference was made to the peculiar practice prevailing in the inferior Court. What is said is of general, perhaps it would not be going too far to say of universal, application to all courts of the United States.

In this case the trial occurred in October, 1860. The record states that there was a regular continuance to April term, 1862, passing over the two terms of 1861, that in October, 1862, without farther continuance, the Court held that the verdict was good and entered judgment accordingly, and then the bill of exceptions was reduced to form and signed. [pp. 3, 4.]

It so happens that the same enunciation of the law was made some years later in a case from the New York Circuit. In the case of *Martha Bradstreet*, reported 4 Peters, this Court (p. 107) says: "The law requires that a bill of exceptions should be tendered at the trial. But the usual practice is to request the judge to note down in writing the exceptions, and afterwards, *during the session of the Court*, to hand him the bill of exceptions, and submit it to his correction from his notes. If he is to resort to his memory it should be handed to him immediately, or in a reasonable time after the trial. It would be dangerous to allow a bill of exceptions of matters dependent on memory at a distant period, when he may not accurately recollect them, and the judge ought not to allow it!"

In that case, the bill of exceptions which the judge was asked to sign was tendered to him "several weeks after the trial;" in this case it bears date two years after. On the argument in that case it was stated by counsel, "the

bill of exceptions was not made out and tendered to the judge at the trial, which is the practice in New York." [p. 104.]

On this point the cases of *Sikes* v. *Ransom*, 6 Johns., 281, and *Wright* v. *Sharp*, 1 Salk., 288, may be referred to. It is deemed unnecessary to advert to other authorities.

It may be observed that there is nothing in this record to induce the belief that the charge to the jury was reduced to writing at the time it was delivered, and as little that the exceptions were then taken and noted.

Other irregularities denounced by this Court are also apparent on this record.

1. The entire evidence given by both parties on the trial is embodied, a practice which this Court has repeatedly condemned. *Diatogue* v. *Pennock*, 2 Peters, 15.

2. The entire charge of the presiding Judge is incorporated; equally, and as often denounced. *Carver* v. *Astor*, 4 Peters, 1; *Magniac* v. *Thompson*, 7 Peters, 348; *Gregg* v. *Sayre*, 9 Peters, 182; *ex parte Crane*, 5 Peters, 190, and this seems to be the latest English practice: *Soares* v. *Glyn*, 55 Engl. Com. Law; 24, 8 Queen's B., 24.

It may be inferred, though there is no positive evidence of the fact in the record, that the interval between the trial of the cause in 1860, and the entry of the judgment in 1862, was occupied in an application to the Court to set aside the verdict.

The language of the judgment warrants this inferrence: "all, and singular, the premises being seen, and by the Court now fully understood, it appears to the said Court that the verdict aforesaid, in form aforesaid given, is good

and valid in law, and the plaintiff ought to recover from the said defendants, &c." This phraseology is certainly not in accordance with the ordinary *ideo consideratum est.* If this conjecture is right, even if the principle asserted by Mr. Justice Story in *Cunningham* v. *Bell*, 5 Mason, 161, that a motion for a new trial will not be entertained unless the bill of exceptions is waived, be not a decisive objection in the present case; yet it would follow, that not only did the learned Judge state his view of the law as the questions were presented on the trial, but that after subsequent argument and mature consideration during a period of two years, he found no reason to change his opinion.

Without pressing farther the points which have been suggested, and submitting them to the consideration of this Court, we may now proceed to notice the particular exceptions raised on the trial, if, under the circumstances, we are to regard the paper bearing date October, 1862, as a bill of exceptions taken in November, 1860.

1. The counsel for defendants requested the Court to charge the jury—First, that it does not appear by the evidence in the case that either of the defendants had any knowledge or notice that the bonds in question had been stolen, and that defendants therefore were entitled to a verdict. This application was refused by the Court, and in this refusal it is alleged erred. [p. 20.]

This point, it is apprehended, may be summarily disposed of by the remark that the application calls upon the Court to express to the jury its opinion upon, and construction to be given upon a question of fact, in the first place, and then a legal consequence resulting from such construction. First, that there was no evidence to show or to warrant the jury in inferring that either of the defendants knew or had notice that the bonds in controversy had been stolen. Second, that

in the absence of such testimony alone, defendants were entitled to a verdict.

First. As to the first, it is obvious that before the Court could give such an instruction it must form, in order to express it, an opinion upon the whole evidence which plaintiff had produced, weigh its credit and lay down and limit the inferences to be drawn from it.

The language of this Court in *Carver* v. *Jackson*, 4 Peters, 80, 81, is decisive on this point. "With the charge of the Court upon mere matters of fact, and with its commentaries upon the weight of evidence, this Court has nothing to do. Observations of that nature are understood to be addressed to the jury, merely for their consideration, as the ultimate judges of matters of fact; and are entitled to no other weight or importance than the jury, in the exercise of their own judgment, chooses to give them. They neither are, nor are they understood to be binding upon them as the true and conclusive exposition of the evidence." If this be a proper exposition of the law, and it will scarcely be questioned here, then it is manifest that the learned judge did right in refusing to charge the jury as requested.

Second. The legal inference which the counsel for defendants ask the Court to express is wholly erroneous. It involves this proposition, that unless the defendants, or one of them, had knowledge or notice of the fact that the plaintiffs' bonds had been stolen, no matter how negligent they had been, no matter how irregular was their conduct in the transaction, no matter how they might have closed their eyes or stopped their ears to the most notorious and public occurrences, no matter what even their regular clerks could not avoid being cognizant of, they are secure in the possession of plaintiffs' property.

II. The Court was also requested to charge the jury "That there were no such suspicious circumstances attending the transaction between Bates and Murray as to put Murray on inquiry; and Murray is not chargeable with bad faith by any omission on his part to inform himself in regard to the bonds and Bates' title to them, further than he did."

Independently of the answer already given to the preceding point, applicable in their full force and even more strongly to this, there is an additional and conclusive one. It appears that the whole testimony in reference to Bates was introduced by defendants, and it would be an anomaly in a Court to instruct the jury as to the credit to be given and the weight to be attached to such evidence, and that constituting but a part of the case. [p. 10.]

It cannot escape observation that this reference to the record tends strongly to confirm, if not absolutely to demonstrate, that the bill of exception, as it is called, was not prepared and signed, or the exceptions taken, as that paper would indicate.

The counsel for plaintiff here rested his case. Whereupon, the counsel for defendants *then* and *there* requested the Court to charge the said jury. Two requests appear to have been made simultaneously; they are numbered first and second, and equally appear to have been presented upon the resting of the plaintiff's testimony, before defendants had opened their case, while it appears on the record that the latter instruction prayed was founded entirely upon evidence given by defendants. [p. 20.]

The residue of this case, as presented in the bill of exceptions, involves matters more complicated, and I may be permitted to add mystified, than those which have been considered.

The charge of the Court fills more than two pages of the printed record. From this there are selected, page 21, first paragraph, five lines; paragraph two, eight lines, and on the last page eight more lines, to which exception is taken. These three sentences are selected from the context, to which no objection appears to have been made, and made the objects of attack. They shall be examined *seriatim* and in order. [pp. 20, 21, 22.]

I. "The notice, according to the settled law of the land, in the absence of express notice, must be express or its equivalent. That is, in the absence of express notice, direct notice, there must be circumstances of suspicion accompanying the transaction, so strong and apparent as to lead a man of ordinary prudence to see that there was something wrong or out of the way in the matter."

Now with great deference to the learned counsel who prepared this bill of exceptions, I would submit, taking this sentence by itself, segregated from the residue of the paper, and from the report of the evidence, which is in no form made a part of the bill, whether it can be understood or is susceptible of interpretation. It is as pure a specimen of an abstraction, considered by itself, as the well-known description of the abstract idea of a salt-box, by the elder Judge Hopkinson. Without referring to the testimony irregularly introduced into the record, and which is not made a part of the bill of exceptions; without reference to the residue of the charge of the Court, which cannot, according to any of the known and established principles regulating bills of exception, be taken as constituting a part of that instrument, this sentence is wholly unintelligible.

If disregarding and departing from the long established laws on this subject we are required to refer to the entire report of the testimony and the remainder of the charge, for the purpose of ascertaining the signification of this sen-

tence, it would seem that the learned judge must and intended to be understood as saying, "that when an individual, like the plaintiff in this case, is the lawful owner of bonds like those the subject of this controversy, which are burglariously stolen from him, and they are found in the possession of a third party claiming to be a *bona fide* purchaser of them; in order to deprive him of this character and his defence against the legal owner's reclamation, it is necessary that notice of such loss should be given to the present holder"—and "this notice, according to the settled law of the land, in general terms must be express or its equivalent. That is, in the absence of express notice, direct notice, there must be circumstances of suspicion accompanying the transaction, so strong and apparent, as to lead a man of ordinary prudence to see that there was something wrong or out of the way in the matter." Whether or not the evidence in the case showed "such circumstances of suspicion" was a question of fact left entirely to the jury, and upon which the Court did not express a shadow of an opinion.

Is it possible that the soundness of this doctrine can be questioned in the commercial emporium of the United States or impugned here? If there be any deficiency in this exposition of the law, the defect was for the benefit of defendants. The rule, as laid down in Chitty on bills (c. VI. p. 277, Springfield Edit., 1839) is—"If the holder of a bill of exchange, &c., or other note transferable by mere delivery, lose or be robbed of it, and it get into the hands of a person not aware of the loss or robbery, *bona fide* and *for a sufficient consideration* under circumstances which would not excite suspicion in a prudent and ordinary man previously to its being due," such person may recover upon such instrument. The numerous authorities cited in the margin, of Chitty, amply support the doctrine laid down in the text. It is unnecessary to refer more particularly to any

others than those of *Lowndes* v. *Anderson*, 13 East., 130, &c., and *Fulton Bank* v. *Phenix Bank*, 1 Hall's R., 562. Upon all the grounds which have been advanced, it is submitted that upon this exception the plaintiffs in error are not entitled to a reversal of this judgment.

The next sentence in the charge of the Court, to which exception is taken is, "and the question in the case is this, whether upon the circumstances, taking them altogether, taking the whole transaction altogether, whether these circumstances are so strong, so apparent in respect to the transaction, in respect to the good faith of the transaction, to the persons who presented the paper for negotiation to the defendant, as to lead a man of ordinary prudence or ordinary care, to see that there was something out of the way, something beyond the usual circumstances attending a negotiation of this kind, something wrong in the operation in the transaction." [pp. 21, 2.]

This exception is open to most of the objections which have been already urged in the preceding remarks. It is indeed open to others. If we are to refer to the evidence as copied into the record, it will be found to consist of the testimony of several witnesses, memoranda and papers of sundry kinds—the testimony of the witnesses on the respective sides not altogether harmonious. No one portion of the testimony appears to have been objected to on the trial, nor is any question raised as to the competency of any portion of it. In such a case was there any course left open to the Court than that which was taken, to leave the decision of the facts, upon which the whole case turned, to the judgment of the jury. The jury to weigh the whole evidence, all the circumstances of the case, and the single fact was submitted to their determination, and that was as to the manifestation of proper and ordinary caution on the part of defendants. Unless I misapprehend the law arising on the

facts developed in the testimony, defendants had no right or reason to ask or expect a statement of the law applicable to the case other than that which was given from the bench. Indeed, it might, with much more plausibility, be argued, that if either party had grounds to complain of the charge, it was the plaintiff's below.

The remaining clause in the charge, which is made the subject of exception, is the following: "It will be for you to say whether the defendant has made out, as the burthen lies upon the defendant, whether he has made out that he received this paper in good faith, without any notice of the defect of the title, in other words of the theft from the plaintiff, or whether there were circumstances of the character which I have described to you as would warrant the inference that there was ground of suspicion, and that he should have made further inquiry as to the character of the paper." [p. 22.]

With simply the remark of the Court that the burthen of proof was upon the defendant under the circumstances, this part of the charge is nothing more than what had already been expressed. If, as has been already noticed, we are at liberty in discussing the proposition now before us, to advert to the evidence which had been presented by the parties respectively in the progress of the trial, or to the residue of the charge delivered by the Court to the jury, the correctness of this portion of this charge cannot, it is believed, admit of question.

A reference to the report of the testimony given during the progress of the trial will show, that the plaintiff established his case by showing that he was the lawful proprietor of the bonds in question—that they had been burglariously stolen from his possession—that he had promptly given notice of the theft to the public, and most especially in

Philadelphia, where the theft had been committed, and in New York, by circulars, hand-bills and newspapers of general currency; and finally that these bonds had been traced to the possession of defendants. Having established these points he rested his case. Defendants immediately assumed voluntarily, without any intimation of opinion from the Court, the very position which this exception would seem to condemn the Court for declaring. They undertook to show *the circumstances* under which they had become possessed of these bonds, the *bona fides* of the transaction, the consideration they had paid. This was the defence which was submitted to the jury, and upon this part of the case all the discordance which the record discloses in the evidence appears. It certainly wears a singular appearance that any objection should be urged that the Court had indicated its opinion, that in pursuing this course the counsel for defendant had followed that which the law indicated.

A reference to the whole charge of the Court only corroborates this argument. In a preceding part of this charge, the Court in the most distinct terms says: "These bonds were stolen from the plaintiff, and came into the hands of defendant." "Nor is there any dispute but that these bonds were stolen from the plaintiff." "These matters are not in controversy." [p. 20.] "The case, therefore, turns upon the defence set up on the part of defendants, and that is that they received the bonds in good faith, and for value, for money advanced, and without notice of the theft, and without notice that they were stolen; and gentlemen, we instruct you, as matter of law, that if the facts, in your judgment, make out this ground of defence, the defendant is entitled to your verdict. He has obtained a title which is protected by law." Again. "It is admitted and conceded upon the proofs in the case that no direct notice of the defect in the title of this paper had been brought home to the defendant. So far, therefore, as the question of notice or knowledge of the defect is concerned, or knowledge of the

theft, it depends upon the circumstances which have been detailed to you by the witnesses, giving you the whole history of the transaction." [p. 21.] Lastly, and as if to cover the whole of this controversy, the learned Judge tells the jury, "If you are satisfied that he received the paper in good faith, and for full value, then he is protected under the rules of law which I have stated to you. If he did not, the plaintiff is entitled to your verdict." [p. 22.]

To no part of this enunciation of the law was any exception taken. Indeed, the principles thus declared are too well established to be controverted before such tribunals as the Circuit Court, sitting in the commercial emporium of the country, or this Court, so familiar with the usages, practice, and established mercantile law.

It is hoped that no necessity exists for further discussion on these points.

I cannot, however, allow the practice which has prevailed in this case to pass without a few additional comments.

It will be observed that it appears from the record that no objection was made on the trial to the admissibility or competency of any of the testimony offered by either party. All that was tendered was received. The plaintiff, under the practice which prevails in New York, testified, the principal defendant with whom the business had been transacted was examined as a witness. In *Pennock* v. *Diatogue*, 2 Peters, 15, this Court says: "The record contains, embodied in the bill of exceptions, the whole of the testimony and evidence offered at the trial by each party in support of the issue. It is very voluminous, and as no exception was taken to its competency or sufficiency, either generally or for any particular purpose, it is not properly before this Court for consideration, and forms an expensive and unnecessary burthen upon the records. This Court has had occasion, in

many instances, to express its regret on account of irregular proceedings of this nature."

That the rules of practice so emphatically and repeatedly recognized and sanctioned by this Court are in accordance with the long and well established law of England, will appear beyond all question by a reference to Tidd's practice, pages 785, &c. Among other things, at page 788, that accomplished writer says: "The bill of exceptions must be tendered at the trial, for if the party then acquiesce he waives it, and shall not resort back to his exception after a verdict against him; when perhaps, if he had stood upon his exception, the other party had more evidence, and need not have put the cause on that point. The statute indeed appoints no time, but the nature and reason of the thing require that the exception should be reduced to writing when taken and disallowed, like a special verdict or demurrer to evidence; not that it need be drawn up in form, but the substance must be reduced to writing while the thing is transacting, because it is to become a record."

In corroboration of my inferences from the record that judgment was suspended in this case by a motion for a new trial, I may be permitted to state, from a memorandum sent to my client from his counsel, it appears, that Nov. 15, 1860, verdict was rendered by the jury, and a motion for a new trial entered by defendant. June 17, 1861, reasons for a new trial had not been filed. May 16, 1862, motion for new trial overruled, and the record shows that judgment was signed 28th October, 1862; the transcript of this record is dated December 4, 1862, and was filed in this Court.

Under all the circumstances of the case as presented, the irregularities everywhere apparent, the frivolous character of the objections now brought up for adjudication, the delays that have been constantly interposed, the inadequacy of the judgment to make full compensation to the plaintiff for the

injury he has sustained, in consequence of the depreciation of the currency, it is submitted to the Court whether this is not a fit case for an affirmance of the judgment with ten per cent. damages.

RICHARD S. COXE,

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